enumerated in the earlier cases and whether the record supports its findings: (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense. *See* Poulis, 747 F.2d

REASONS FOR GRANTING THE PETITION

The historical events in Societe Internationale, bear many resemblances to the proceedings below. To begin with, in Societe this Court found "Through the efforts of the plaintiff a considerable number of these records were released by the Swiss authorities and tendered the government for inspection." Similarly, the Petitioner in this case fully complied with the first and second discovery requests (C.A. Brief p.3). Therefore, the Petitioner here, as in Societe, also partially complied with the discovery requests. This Court also found "[Plaintiff] explicitly recognizes that it is subject to procedural rules of United States courts in this litigation and has made full efforts to follow these rules. [Plaintiff] asserts no immunity from them. [Plaintiff] asserts only its *inability* to comply . . ." Societe Internationale, 357 U.S. at 212. In contrast to this case, the Petitioner here also made full efforts to follow the court's rules. The Petitioner contacted Defendants 10 days before the scheduled deposition and fully notified them of his *inability* to sit down prolonged because of his police-brutality injury to his spinal cord, and thus requested a 1:00 pm deposition start

time (C.A. Brief p.3-5). The officer jumped on top of Petitioner and **weighed heavily**. In addition, the district court took judicial notice of Petitioner Hector L Huertas' military service-connected fear of heights, which *prevented* him from attending the four prior depositions (C.A. Brief p.6), *infra*. Finally, as in Societe, the court below held that such conduct was not "will ıl" (Pet. App.,*infra*, 6).

The first conflict concerns whether Federal Rules Of Civil Procedure Rule 37 permits the dismissal of a case for failure to comply with deposition discovery requests, given the Federal Court of Appeals' findings that such noncompliance was not willful, and given full good-faith compliance with interrogatory and production requests. In contrast to the Second, Fourth, Fifth, and Sixth Circuits, the Third Circuit's "*Poulis* Balance" has held that so-called "willfulness or flagrant bad faith" need not be met in dismissing a case, with prejudice, which directly contradicts this Courts holding in Societe Internationale, 357 U.S., supra. In addition, the Third Circuit Court's conflicting progeny is followed by other District and Circuit Courts. In fact, District and Courts of Appeals have followed [4] and cited [5] to such "Third Circuit Poulis *Balance*", in deciding the appropriateness of default judgment. The District Court for

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[4] Estates of Ungar ex rel. Strachman v. Palestinian Auth., 325 F. Supp. 2d 15 (D.R.I. 2004); 2004 U.S. Dist. LEXIS 12824 HN 7; Kearns v. GMC, 1998 U.S. App. LEXIS 5956 (Fed. Cir. Mar. 24, 1998); Shepherd v. ABC, 62 F.3d 1469, 1479 (D.C. Circuit 1995); Smith v. Smith, 2005 Minn. App. LEXIS 527 (Minn. Ct. App. May 17, 2005)

[5] Ball v. City of Chicago, 2 F.3d 752, 759 (7th Cir. 1993) (*citing the "Poulis* Balance" Poulis v. State Farm Fire & Casualty Ins. Co., supra, 747 F.2d at 868-69); Omaha Indian Tribe, Treaty of 1854 etc. v. Wilson, 575 F.2d 620 (8th Cir. Iowa 1978); Mut. Serv. Ins. Co. v. Frit Indus., 358 F.3d 1312, 1327 (11th Cir. Ala. 2004)

the District of Rhode Island is within the geographic boundaries of the First Circuit Court of Appeals.

A subsidiary question concerns whether a District Court , adhering to the "*Poulis* Balance", errs in imposing Federal Rules of Civil Procedure Rule 11 sanctions *sua sponte* against a pro-se Plaintiff without initiating a show-cause order under Rule 11 (c)(1)(B), *infra* at p.16-17. *See* Schlagenhauf v. Holder, 379 U.S. 104, 112 (1964). In *Schlagenhauf*, the Court noted that it may deal directly with the district court when the subject concerns rules the Court formulates.

A well- established ground for granting certiorari, pursuant to Rule 10(a), is the existence of a conflict between the lower court decision in which review is sought and that established by the Supreme Court. Both of these conflicts merit further review.

I. The Third Circuit Has Decided An Important And Recurring Issue Of The Federal Rules Of Civil Procedure Rule 37(b) In A Manner That Conflicts With Standing Decisions Of The First, Second, Sixth, Ninth Circuits, And This Court's Holding In Societe Internationale v. Rogers

A. This Case Squarely Presents This Conflict

The decision below creates a conflict in the circuits over whether a showing of "willfulness or flagrant bad faith" as opposed to *inability*, as construed in Societe, is conditional under Rule 37 in the imposition of dismissal of a case, with prejudice. In contrast, the Sixth Circuit decided not to adhere to the Third Circuit's "Poulis *Balance*". *See* Stones River Motors, Inc. v. Nissan Motor Mfg. Corp., U.S.A. 863 F. 2d 50 (6th Cir. 1988). Instead, it abided by its own

progeny to Societe, i.e. Regional Refuse Systems v. England Reclamation Company, 842 F.2d 150 (6th Cir. 1988). In Regional Refuse Systems at p.154 the Sixth Circuit held that "Other circuits have required a showing of bad faith as opposed to *inability* to comply with a discovery order, as a condition for dismissal under Rule 37(b). [*citing*] Kotlicky v. United States Fidelity & Guar. Co., 817 F.2d 6 (2d Cir. 1987)." In fact, pursuant to "*Poulis* Balance", a district court may dismiss a case based solely on the second factor, i.e. "the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery", or based solely on the fifth factor or both, i.e. "the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions". Clearly, such arbitrary scheme violates the due process clause under the Fifth Amendment. *See* Estrada v. Rowland, 69 F.3d 405, 406 (9th Cir. 1995), to wit,

> . . . defendants moved to dismiss. On November 1, 1993, a federal magistrate recommended dismissal, finding that [Plaintiff's] refusal . . . was frivolous, that a new deposition would cost [defendants] $500, that [Plaintiff] was unlikely to cooperate in a new deposition, and that monetary sanctions would have no effect because [Plaintiff] could not pay them. . . the district court accepted the magistrate's findings and dismissed the action. . . Accordingly, the dismissal by the district court is reversed and remanded.

See also R.W. Int'l Corp v. Welch Foods, Inc., 937 F.2d 11, 15 n. 2(1st Cir. 1991), to wit,

> "failure to appear" for a deposition is strictly construed and Rule 37(d) sanctions apply only when a deponent literally fails to show up for a deposition session.

The Third Circuit's *"Poulis* Balance" thus creates confusion in that Circuit. *See* footnote 4, i.e. Estates of Ungar ex rel. Strachman v. Palestinian Auth.,325 F. Supp. 2d 15 (D.R.I. 2004); 2004 U.S. Dist. LEXIS 12824 HN 7, which follows the *"Poulis* Balance".

Additionally, the Third Circuit's *"Poulis* Balance" also contradicts standing decisions of the District Court for the Northern District of Ohio such as Ross v. True Temper Corp., 11 F.R.D. 307 (N.D. Ohio 1951), to wit,

> The requirements of the law would not be served by the drastic remedy of dismissal suggested by the defendant. There is no showing of unexplained, willful and deliberate disregard of court process. Cf. Collins v. Wayland, 139 F.2d 677 (9th Cir. 1944), Peitzman v. City of Illmo, 141 F.2d 956 (8th Cir. 1944). Nor, under the extenuating circumstances, does plaintiff's failure to proceed under Rule 30(b), when he was notified to appear for his deposition, justify it.

Moreover, the Third Circuit's *"Poulis* Balance" also contradicts standing decisions of the District Court for the Northern District of Ohio such as Dunn v. Pennsylvania R. Co., 96 F. Supp. 597(N.D. Ohio 1951), to wit,

> . . . and it appeared that plaintiff's failure to answer interrogatories addressed to him by defendant was not a willful failure but because of lack of knowledge of the Federal Rules, the court, in exercise of its discretion, would not dismiss the action for plaintiff's failure to answer the interrogatories. . .

In contrast to Societe, the court below, in accord with *Poulis*, found no evidence to support its conclusion that the Petitioner was **able** to sit down prolonged and thus comply with Respondents' 9:30 am deposition start time (C.A. Brief p.3-5). Instead, it only found evidence proving that the

Petitioner Hector L Huertas' noncompliance to such request was not willful because of Petitioner's disabilities (Pet. App.,*infra*,6). The lower court's conclusion is consistent with its "*Poulis* Balance" but contradicts Societe Internationale and R.W. Int'l Corp 937 F.2d supra.

B. The Issue Presented by the Conflict is Recurring and of Great Practical Importance

The conflict in the circuits over the requirement of "willfulness or flagrant bad faith" in imposing default sanction is particularly significant because of its far-reaching legal and practical effects. First, the Third Circuit's decision arises out of its analysis of its "*Poulis* Balance" (Pet. App., *infra*, 19-F.; C.A. CJ p.11) [6]. The "*Poulis* Balance" is followed and cited by numerous Circuits that involve if not thousands of cases, to which the "*Poulis* Balance" has already been applied. Therefore, the opinion has a far more substantial impact than the typical appellate decision in an ordinary default judgment case involving the analysis of the due process clause under the Fifth Amendment.

Furthermore, the "*Poulis* Balance" dismissal, with prejudice, is not confined to civil rights cases but will improperly dismiss any action without affording a party the opportunity for a hearing on the merits of his cause. Virtually any party whom in good-faith complies with discovery requests but is unable to fully comply with another discovery request may be arbitrarily denied his day in court, which is what Societe Internationale was designed to prevent.

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[6] The designation "C.A. CJ p.x" refers to critical portions of the record within Respondent City of Philadelphia's Brief and Joint Appendix filed in the Third Circuit Court dated May 16, 2005.

The "*Poulis* Balance" decision below will have an enormous impact on civil actions involving meritorious claims or defenses. Allegations of noncompliance with individual discovery requests, even if unsubstantiated, may trigger default judgments. In any other case, any party could bring such allegations against the opposing party, asserting noncompliance with a particular discovery request although full compliance to other discovery requests was achieved. Adhering to the holding in Societe, not the Third Circuit's "*Poulis* Balance", is the appropriate forum for considering such allegations, through this Court's established precedents.

Finally, "*Poulis* Balance" default judgments, such as this one, that allege noncompliance with discovery could lead to deterring a party, particularly plaintiffs, from filing suit although such party may indeed enjoy a meritorious cause.

II. The Decision Below Reflects Widespread Uncertainty Over the Interpretation of Societe Internacionale v. Rogers, Which Only This Court Can Resolve

The decision in Societe Internationale v. Rogers, 357 U.S. 197, 212 (1958) has brought about a sharp conflict in the Circuits on a fundamental question of immense importance to the scope of the due process clause under the Fifth Amendment: whether Societe requires a showing of "willfulness or flagrant bad faith" as opposed to *inability* to comply with a discovery order, as a condition for dismissal under Rule 37(b). *See* Regional Refuse Systems v. England Reclamation Company, 842 F.2d 150, 154 (6th Cir. 1988), *citing* Kotlicky v. United States Fidelity & Guar. Co., 817 F.2d 6 (2d Cir. 1987). In Societe Internationale, this Court concluded,

> In view of the findings in this case, the position in which petitioner stands in this litigation, and the serious constitutional questions we have noted, we think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner. Societe Internationale, supra, 357 U.S. at 212.

The confusion in the lower courts is difficult to trace because the Third Circuit does not cite any statute, precedent, or binding authority in support of its "*Poulis* Balance" other than the factors "that have been enumerated in the earlier cases." Although the "*Poulis* Balance" is designed to justify the dismissal of an entire case or defense, it does not "purport to use summary judgment standards", which adds fuel to the confusion. *See* Poulis 747 F.2d at p. 869. Without further clarification, the District and Circuit Courts of Appeals that follow the "*Poulis* Balance" may or may not continue to eliminate "willfulness or flagrant bad faith", and the due process clause under the Fifth Amendment, from their decisions concerning dismissal of a case, with prejudice.

III. The Decision Of The Third Circuit Cannot Be Reconciled With This Court's Ruling In Societe Internationale v. Rogers And Thus Threatens Adverse Consequences To Everyone's Due Process Rights Under The Fifth Amendment

A. The Court Below Erred In Concluding That "Willfulness or Flagrant Bad Faith" Is Not Conditioned In Imposition of Dismissal With Prejudice

There is no good reason to forgo meritorious claims or defenses because the Third Circuit's "*Poulis* Balance" is incorrect. The court below has historically misconstrued this Court's precedents. Buckman Co. v. Plaintiffs' Legal Comm. 531 U.S. 341 (2001) 159 F.3d 817 (3rd Cir. 1998), reversed. In fact, this Court has found that the most drastic sanctions may not be imposed as "mere penalties." *See* Hammond Packing Co. v. Arkansas, 212 U.S. 322, 350 (1909); *citing* Hovey v. Elliott, 167 U.S. 409 (1897). In addition, this Court held in Societe that "Denying a judicial hearing as to the propriety of the government's seizure because of the foreign national's *inability* to fully comply with requirements of the production order despite *good-faith efforts*, rather than willfulness or bad faith, would have violated petitioner's due process rights." Societe Internationale v. Rogers, 357 U.S. 197, Summary (1958).

1. Even assuming, arguendo, that the Third Circuit is within the understanding of Societe, the "*Poulis* Balance" misapplies those principles. In particular, this Court in Societe found:

> . . .Noting that the burden was on petitioner to show good-faith in its efforts to comply with the production order, and taking as the test of good faith whether petitioner had attempted all which a reasonable man would have undertaken in the circumstances to comply with the order, the Master found that ". . . the plaintiff has sustained the burden of proof placed upon it and has shown good-faith in its efforts [to comply with the production order] in accordance with the foregoing test. "Societe Internationale 357 U.S. at p. 200.

The Third Circuit "*Poulis* Balance" erroneously applies this Court's holding and permits the most draconian sanction although, as in the instant case below, the Petitioner meets such burden of proof in that disabilities prevent the attendance to the deposition, and that such nonattendance is not willful or flagrant bad faith, and that interrogatory and production requests are fully complied with, supra at p.7-8.

2. The district court took judicial notice of Petitioner's military service-connected fear of heights, which prevented him from attending the four prior depositions (Pet. App.,*infra*, p.6,11). However, in order to strengthen its analysis of its "*Poulis* Balance", the court below agreed that the Petitioner should have filed for a protective order above and beyond the doctor expert reports he had already filed in the district court (Pet. App., *infra*, 6,10,17; En Banc p.17; C.A. Brief p.4) [7]. However, the cases are divided as to whether a protective order must be sought, that is, above and beyond doctor expert reports, concerning deposition notices. *See* Scarlatos v. Kulukundis, 21 F.R.D. 185 (S.D.N.Y. 1957); and Ross, 11 F.R.D. at p.11 supra. Petitioner did respond to Respondents deposition notices (C.A. Brief p.6, C.A. Reply 23-24) [8].

3. A subsidiary question concerns whether a district court errs in imposing Federal Rules of Civil Procedure Rule 11 sanctions *sua sponte* against a pro-se civil rights Plaintiff without initiating a show-cause order under Rule 11 (c)(1)(B) (En Banc, p.4-5). In passing, such Rule 11 sanctions are incorporated in the first and fifth factors of the Third

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[7] The designation "En Banc p.x" refers to critical portions of the record within pro-se Petitioner's Petition for Rehearing and Rehearing En Banc filed in the Third Circuit Court on July 31, 2005.

[8] The designation "C.A. Reply x" refers to critical portions of the record within Petitioner's Reply Brief filed in the Third Circuit Court on June 9, 2005.

Circuit "Poulis *Balance*", which directly contradicts the due process clause of the Fifth Amendment (Pet., App.,*infra*, 13-14, 18) and supra p.6-7. *See also* Schlagenhauf v. Holder, 379 U.S. 104, 112 (1964); and Haines v. Kerner, et al, 404 U.S. 519, 520-21 (1972) in which pro se complaints are held to less stringent standards than formal pleadings drafted by lawyers. Additionally, the Fourth Amendment claims are not in dispute because Respondents admitted that the Petitioner was detained, apprehended, searched, struggled with, transported to Hospital as a result of police action, interrogated, incarcerated, and fingerprinted on 10/26/2000 (C.A. Reply p.3). Rule 15(b) allows amendments where issues not in the pleadings are tried in court, after express or implied consent of both parties. Even if no amendments made, result is the same on judgment. Again, Petitioner Hector L Huertas, being pro se, assumed the Courts below would properly interpret such rule. The District Court categorically refused to acknowledge Rule 15(b) (En Banc 5-6). Respondents did not proffer sufficient evidence showing its branch was, in fact, robbed (C.A. Reply 16-19).

4. Rule 37 strictures are also specific deterrents and, like civil contempt, they seek to secure compliance with the particular order at hand. The Third Circuit's *"Poulis* Balance" does not apply this factor as to whether compliance with the district court's particular order was, in fact, adequately sought. In the case below, the particular district court order at hand was the granting, on October 6, 2004, of defendants' motion to compel discovery. Therefore, Petitioner's attendance to the deposition was compelled within 30 days. (C.A. CJ S.a. p.8) [9] The deposition was

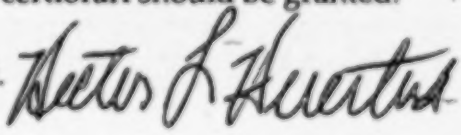
[9] The designation "C.A. CJ S.a. x" refers to critical portions of the record within Respondent City of Philadelphia's Joint Supplemental Appendix filed in the Third Circuit Court dated May 16, 2005.

scheduled for the 29th day, i.e. November 4, 2004 (C.A. CJ S.a. p.9). The case was dismissed under the *"Poulis* Balance" abruptly thereafter (C.A. CJ S.a. p.9).

5. The purpose of the relevant district court's order in Societe, was that the defendant's discovery request would produce bank records and that "such records might prove to be crucial in the outcome of this litigation." Societe Internationale 357 U.S. at 201. The district court in the instant appeal, adhering to the *"Poulis* Balance", did not conclude that defendants' deposition of the Petitioner Hector L Huertas (Rieckehoff) would produce evidence that "...might prove to be crucial in the outcome of this litigation."

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted. 

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October, 2005

APPENDICES

A. Third Circuit Denial Of Rehearing *En Banc* (Sep, 7, 2005). . . . . Pet.App. 1
B. Opinion Of U.S. Court of Appeals for the Third Circuit . . . . . Pet.App. 3
C. Opinion of U.S. District Court for the Eastern District of Pennsylvania (Jan. 31, 2005). . . . . Pet.App. 8

AUNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-1642

HECTOR L. HUERTAS,

Appellant

v.

CITY OF PHILADELPHIA; SUN BANCORP, INC.

On Appeal from the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 02-cv-007955)
District Judge: Honorable Herbert J. Hutton

Present: SCIRICA, *Chief Judge*, SLOVITER, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER and VAN ANTWERPEN, *Circuit Judges*.

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellant having been submitted to all judges who participated in the decision

of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

/s/ D. Michael Fisher
Circuit Judge

Dated: September 7, 2005

HECTOR L. **HUERTAS**, Appellant

v.

CITY OF PHILADELPHIA; SUN BANCORP, INC.

NO. 05-1642

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

July 14, 2005, Submitted Under Third Circuit L.A.R. 34.1(a)
July 19, 2005, Filed

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JUDGES: Before: SLOVITER, BARRY and FISHER, CIRCUIT JUDGES.

OPINION:

PER CURIAM

This appeal arises from the dismissal of Appellant Hector **Huertas**' complaint as a sanction for his continued failure to attend scheduled depositions. For the reasons that follow, we will affirm.

The parties are familiar with the facts, thus, we will only briefly summarize them here. On October 17, 2000, a robbery was reported at the Sun National Bank in Philadelphia. On October 26, 2000, **Huertas** walked into the bank. A bank employee, believing that **Huertas** fit the description of the robber, notified the Philadelphia Police. **Huertas** alleges that the police responded by violently arresting him, causing permanent injuries. On October 18, 2002, **Huertas** filed a complaint under 42 U.S.C. § 1983 alleging violations of his civil rights by the City of Philadelphia in conspiracy with Sun Bancorp.

Huertas immediately requested that the Defendants complete hundreds of interrogatories, and began filing numerous motions with the District Court. After a number of filings by all parties, the District Court entered a series of orders denying **Huertas**' motions to compel discovery and to amend his complaint, as well as several other motions seeking various other remedies. See D. Ct. Docket Nos. 40-50. During this period, the Defendants scheduled a deposition, which **Huertas** failed to attend. This process of notice and failure to attend recurred several times over the course of the next year. On November 8, 2004, while still in the discovery phase, the Defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 37(b), (d). The District Court held that **Huertas**' failure to attend multiple depositions, once in defiance of a court order, was sufficient to warrant dismissal after conducting the six-factor inquiry announced in Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863, 868 (3d Cir. 1984).

We have jurisdiction under 28 U.S.C. § 1291 and review the dismissal of a complaint under Rule 37 for abuse of discretion. Id. In determining whether the District Court abused its discretion, "we will be guided by the manner in which the court balanced the Poulis factors and whether the record supports its finding." Ali v. Sims, 788 F.2d 954, 957 (3d Cir. 1986). The factors are:

(1) the extent of the party's personal responsibility; (2) the prejudice, to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

Poulis, 747 F.2d at 868.

First, the District Court concluded that **Huertas** was personally responsible. The record confirms that **Huertas**, who is proceeding pro se, failed to adhere to the local and federal rules of procedure, despite the District Court's attempts to provide guidance. See Order, Docket No. 49, n.1; Order, Docket No. 89 n.1; Order, Docket No. 104 n.2. **Huertas** argues that because he appeared for his fifth deposition on November 4, 2004, at 1:37 p.m., only four hours late, it was the Defendants' fault for not taking his deposition at that time. His argument is without force. He provides no reason as to why he did not arrive at 9:30 a.m. Further, that the Defendants used email to reject **Huertas'** request to reschedule the deposition does not transfer the fault to the Defendants. If anything, **Huertas'** failure to check

his email, a means of communication he clearly intended to use, only damages his argument.

Next, we agree with the District Court that the Defendants suffered substantial prejudice in scheduling and holding five depositions, all of which **Huertas** failed to attend. See Hicks v. Feeney, 850 F.2d 152, 156 (3d Cir. 1988) (finding the costs and time associated with scheduling unattended depositions was prejudicial). Also, **Huertas'** failure to appear for depositions after receiving adequate notice and his failure to pursue any protection from the District Court establishes a pattern of dilatory conduct. See Adams v. Trustees of New Jersey Brewery Employees' Pension Trust Fund, 29 F.3d 863, 874-75 (3d Cir. 1994).

With respect to bad faith or willfulness, **Huertas** argues that his fear of heights and back injury prevented him from attending his depositions, and that his lack of attendance was not designed to prevent the defense from taking his deposition. It is not so clear that **Huertas'** conduct was willful as defined by this Court. Adams, 29 F.3d at 875 ("tardiness not excused for inability is not necessarily willful."). **Huertas'** disabilities did not, as far as we can discern, prevent him from timely filing for protective orders, nor does he explain how his disability prevented his 9:30 a.m. appearance at his fifth deposition. However, this does not show that **Huertas'** conduct was designed to be "strategic or self-serving," an inference usually required for a finding of willfulness. Id. With respect to the fifth factor, alternative sanctions would likely be ineffective, **n1** or at least other available sanctions would amount to what in effect would be the dismissal of the complaint.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 For example, even after **Huertas** was ordered to pay $ 200

for failure to comply with applicable rules of procedure, no significant change was seen in his conduct.

---------- End Footnotes----------

Finally, we agree that **Huertas'** complaint asserts arguably meritorious claims. While we continue to adhere to the principle that "doubts should be resolved in favor of reaching a decision on the merits," see Scarborough v. Evans, 747 F. 2d 871, 878 (3d Cir. 1984), that **Huertas'** conduct was not necessarily willful does not make the District Court's balance unreasonable. See Ware v. Rodale Press, Inc. 322 F.3d 218, 221 (3d Cir. 2003) (stating "each factor need not be satisfied for the trial court to dismiss a claim"). The District Court did not abuse its discretion in dismissing the complaint. Accordingly, we will affirm. **n2**

---------- Footnotes ----------

n2 Huertas also appeals from a number of other orders denying his various motions to amend his complaint, compel discovery, and for either dismissal or default judgment. Our affirmance of the District Court's dismissal is dispositive. Accordingly, we need not decide the propriety of these other orders.

HECTOR L. HUERTAS

v.

CITY OF PHILADELPHIA, et al.

CIVIL ACTION No. 02-7955

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

January 26, 2005, Decided
January 31, 2005, Filed; January 31, 2005, Entered

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JUDGES: HERBERT J. HUTTON, S.J.

OPINIONBY: HERBERT J. HUTTON

OPINION:
MEMORANDUM AND ORDER

HUTTON, S.J.

January 26, 2005

I. BACKGROUND

On October 18, 2002, Plaintiff Hector Huertas, proceeding pro se, filed a complaint against the City of Philadelphia ("City") and Sun Bancorp., Inc. ("Bank") alleging violations of his civil rights pursuant to 42 U.S.C. § 1983. The gravamen of

Plaintiff's complaint is that he was wrongfully accused of robbing a Sun Bancorp branch, resulting in his arrest by Philadelphia police officers. Plaintiff alleges that he sustained injuries due to the Philadelphia police officer's use of excessive force during the arrest.

Although Plaintiff filed the complaint in October of 2002, the case is still in the discovery phase. A review of the docket reveals numerous discovery issues over the past two years. Most notably is Plaintiff's failure to appear for his own scheduled deposition on five different occasions. The records before the Court show that Defendant City first scheduled Plaintiff's deposition for May 12, 2003 and gave him notice of this deposition on April 25, 2003. Plaintiff never responded to the notice, never filed a motion for a protective order with the Court, and failed to appear at the scheduled time. Defendant City next scheduled Plaintiff's deposition for May 27, 2003. Defendant City gave Plaintiff notice of this deposition on May 13, 2003. Plaintiff never responded to the notice, never filed a motion for a protective order with the Court, and failed to appear. Defendant City next scheduled Plaintiff's deposition for June 17, 2003 and gave Plaintiff notice of this deposition on June 5, 2003. Plaintiff again failed to respond to the notice, failed to file a motion for a protective order, and failed to appear. n1 In July of 2004, both Defendants scheduled separate depositions for Plaintiff. Defendants later combined the depositions into one deposition scheduled for July 22, 2004. Plaintiff received notices on July 1, 2004, July 2, 2004, and July 8, 2004. On July 9, 2004, Plaintiff notified Defendants of his objections to the deposition. Defendants rejected these objections and notified Plaintiff that the deposition would continue as scheduled. Plaintiff failed to appear and failed to file a motion for a protective order with the Court. On

August 2, 2004, Defendants filed a motion to compel Plaintiff's appearance at his deposition. In an Order dated October 5, 2004, the Court granted Defendants' motion and ordered Plaintiff to appear at his deposition within thirty days. The Court considered Plaintiff's fear of heights and instructed that the deposition take place no higher than the second floor of a building. Defendants scheduled the deposition on November 4, 2004 at 9:30 a.m. on the first floor; Plaintiff failed to appear at the scheduled time. n2

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Plaintiff filed a motion to stay discovery on June 12, 2003 pending his appeal to the Third Circuit. The Court granted the motion to stay discovery on July 11, 2003.

n2 Defendants properly notified Plaintiff that his deposition was scheduled for 9:30 a.m. on the first floor. Plaintiff responded by sending a letter to Defendants objecting to the deposition because the notice did not state the name of the court reporter. Within this letter was a request to schedule the deposition at a later time. Defendants rejected Plaintiff's requests and notified Plaintiff that the deposition would occur as originally scheduled in compliance with the Court's Order. Plaintiff apparently appeared for his 9:30 a.m. deposition at 1:37 p.m. on November 4, 2004. Neither Plaintiff's letter, nor the fact that he arrived four hours late satisfied Plaintiff's duty to abide by this Court's order.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Defendants now ask the Court to dismiss the action under

Federal Rule of Civil Procedure 37 based on Plaintiff's failure to attend his deposition and comply with an order of this Court. For the reasons listed below, the Court will grant Defendants' motion.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 37(d) states:
if a party . . . fails to appear before the officer who is to take the deposition, after being served with a proper notice, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule.

Fed. R. Civ. P. 37(d). Although Rule 37(d) allows a court to make such orders "as are just," it specifically references the sanctions outlined in Rule 37(b)(2). That rule permits a court to issue an order "dismissing the action" as a sanction for discovery abuse or failure to comply with a court order. See Fed. R. Civ. P. 37(b)(2)(C).

The Third Circuit set forth the factors a court must balance when determining whether to dismiss an action as a sanction for discovery abuse. See **Poulis** v. State Farm Fire & Cas. Co., 747 F.2d 863, 867-68 (3d Cir. 1984). The six **Poulis** factors are,

(1) the extent of the party's personal responsibility; 2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; 3) a history of dilatoriness; 4) whether the conduct of the party or the attorney was willful or in bad faith; 5) the effectiveness of

sanctions other than dismissal, which entails an analysis of alternative sanctions; and 6) the meritoriousness of the claim or defense.

Id. at 868. The **Poulis** test is not a "mechanical calculation" for deciding whether to dismiss a plaintiff's complaint. See Mindek v. Rigatti, 964 F.2d 1369, 1373 (3d Cir. 1992). Also, it is not necessary that all of the **Poulis** factors are satisfied to justify dismissal of the claim. See id. Deciding whether to dismiss the action under **Poulis** requires a balancing of the factors in the "context of the district court's extended contact with the litigant." Id. The Court will evaluate Plaintiff's actions under each of the six **Poulis** factors to determine whether to dismiss Plaintiff's claim.

III. DISCUSSION

A. Extent of Plaintiff's Personal Responsibility

The first **Poulis** factor looks at the party's personal responsibility for the misconduct. Here, Plaintiff is representing himself. This is not a case where Plaintiff's counsel is responsible for the discovery violations. Although courts grant pro se litigants some leeway in following the requirements detailed in the Federal Rules of Civil Procedure, all litigants have an "obligation to comply with court orders." See Burns v. Glick, 158 F.R.D. 354, 356 (E.D. Pa. 1994).

This Court has granted Plaintiff much leeway regarding the requirements of the federal and local rules. Within the first six months of discovery, Plaintiff filed six motions to compel with the Court. None of these motions complied with Local Rules 7.1(c) or 26.1(f). In an Order dated April 24, 2003, the

Court cautioned Plaintiff to abide by these rules or face sanctions including dismissal. See Docket No. 42. The Court also included the relevant portions of the rules in the footnote of that Order. In an Order dated April 30, 2003, the Court again reminded Plaintiff of the need to attempt to resolve discovery disputes without the Court's intervention. The Court instructed Plaintiff to abide by Federal Rule of Civil Procedure 37(a)(2)(A) and certify to the Court that he attempted to resolve all discovery disputes with the opposing party. Despite these detailed instructions from the Court, Plaintiff continued to file motions without abiding by the federal or local rules. As of the date of this Order, Plaintiff has filed twenty-nine motions. Fifteen of these motions have been motions to compel Defendants to comply with discovery and none of them contain the certificates required by the rules. **n3** Additionally, in failing to appear for his fifth deposition, Plaintiff disobeyed a direct Order from this Court. During the time Plaintiff was scheduled to appear for each deposition, he was filing other motions with the Court. Within these motions, Plaintiff harassed and disparaged Defendants and Defendants' counsels. Defendants have incurred additional unnecessary expenses filing responses to many of these motions.

---------- Footnotes ----------

n3 The Court notes that it is not only the formality of the certificate that is lacking, but any indication of a good faith effort on the part of Plaintiff to resolve the dispute without the Court's involvement. On the contrary, many of Plaintiff's motions contain irrelevant and inappropriate personal remarks regarding Defendants' counsels.

---------- End Footnotes ----------

The Court finds that Plaintiff is personally responsible for his repeated failure to appear for his own deposition, his failure to abide by this Court's Order, and his failure to abide by the relevant federal and local rules. Plaintiff's repeated violations weigh heavily toward dismissing Plaintiff's claim.

B. Prejudice to Defendants

The second **Poulis** factor concerns the prejudice to Defendants caused by Plaintiff's misconduct. See Poulis, 747 F.2d at 868. To find prejudice, a court does not need to find evidence of "irremediable harm" to the opposing party. See Ware v. Rodale Press, Inc., 322 F.3d 218, 223 (3d Cir. 2003). Courts look for evidence of extra costs, repeated delays, and the need to file additional motions in response to the abusive behavior of the responsible party. See Ware v. Rodale Press, Inc., 2002 U.S. Dist. LEXIS 1015, 2002 WL 89604, *3 (E.D. Pa. Jan. 23, 2002). Under **Poulis**, evidence of prejudice to the opposing party weighs heavily in favor of dismissal. See Smith v. Altegra Credit Co., 2004 U.S. Dist. LEXIS 21478, 2004 WL 2399773, *5 (E.D. Pa. Sept. 22, 2004).

Here, Plaintiff's failure to attend his deposition has clearly prejudiced Defendants. Defendants scheduled Plaintiff's deposition five different times and gave him adequate notice each time. Defendants incurred extra costs preparing for and attending each of these five depositions, providing a court reported at each of these depositions, and filing a motion to compel Plaintiff's attendance at his deposition with the Court. These costs were the direct result of Plaintiff's failure to attend his scheduled depositions.

In addition to the costs Defendants have incurred,

Defendants have also been prejudiced by the delay Plaintiff's behavior has caused in the case. Plaintiff's failure to appear for his own deposition has delayed the progress of this case considerably. A "'prolonged delay in litigating a case creates a presumption of prejudice' because it harms a defendant's ability 'to present a full and fair defense on the merits of plaintiff's claim.'" Smith, 2004 U.S. Dist. LEXIS 21478, 2004 WL 2399773, at *5 (quoting Beckman v. Integrated Sys. Int'l, Inc., 2002 U.S. Dist. LEXIS 19394, *10 (E.D. Pa. Sept. 30, 2002)). The Court finds that Plaintiff's failure to attend his own properly noticed deposition, on five different occasions, has prejudiced Defendants. The Court also notes that this prejudice weighs heavily toward dismissing Plaintiff's claim.

C. Plaintiff's History of Dilatoriness

The third **Poulis** factor examines Plaintiff's history of dilatoriness. See **Poulis**, 747 F.2d at 868. "Extensive or repeated delay or delinquency . . . such as consistent nonresponse to interrogatories, or consistent tardiness in complying with court orders" constitutes a history of dilatoriness. Adams v. Trs. of the N.J. Brewery Employees' Pension Trust Fund, 29 F.3d 863, 874 (3d Cir. 1994). In **Poulis**, the plaintiff once failed to answer interrogatories and failed to file a pre-trial statement. See **Poulis**, 747 F.2d at 868. The Third Circuit found this showed a history of dilatoriness. See id. Here, as recounted in detail above, Plaintiff has failed to appear for five properly noticed depositions. Additionally, in failing to appear for his fifth deposition, Plaintiff failed to comply with an Order of this Court. Plaintiff's actions demonstrate a history of dilatoriness and this factor also weighs in favor of dismissing Plaintiff's claim.

D. Plaintiff's Willfulness or Bad Faith

Under the fourth **Poulis** factor, the Court determines whether Plaintiff acted willfully or in bad faith. See Poulis, 747 F.2d at 868. "Willfulness involves intentional or self-serving behavior." Adams, 29 F.3d at 875. In evaluating whether to dismiss with prejudice, the Court looks for the "type of willful or contumacious behavior that can be characterized as acting in 'flagrant bad faith.'" Smith, 2004 U.S. Dist. LEXIS 21478, 2004 WL 2399773 at *6 (quoting Adams, 29 F.3d at 875). A "persistent failure to honor discovery orders may be viewed as a willful effort to evade discovery." Philadelphia Cervical Collar v. Jerome Med., 2003 U.S. Dist. LEXIS 6572 *18 (E.D. Pa. Mar. 31, 2003).

As noted above, Plaintiff has failed to appear for five properly noticed depositions, including the final one for which this Court ordered him to appear. Plaintiff never responded to the first three deposition notices, and filed baseless objections to the final two. Plaintiff requested a protective order for the final deposition, which this Court granted in part and denied in part. Plaintiff was well aware of his obligation to attend his deposition, yet still failed to do so. Additionally, while failing to appear for these five depositions, Plaintiff filed several motions to compel against Defendants. Most of these motions were unfounded, as Plaintiff had not made his discovery requests in compliance with the Federal Rules of Civil Procedure. See Docket No. 49. In an Order denying one of Plaintiff's motions to compel, the Court cautioned Plaintiff that his behavior was "wholly inconsistent with the Federal Rules." Id.

Plaintiff's behavior deeply troubles the Court. As demonstrated in his numerous filings with the Court, many

of Plaintiff's motions contain countless irrelevant and disparaging remarks directed at Defendants' counsels. This behavior further reveals Plaintiff's bad faith and willfulness throughout the two years of discovery and again weighs heavily in favor of dismissal.

E. Effectiveness of Alternative Sanctions

The fifth **Poulis** factor requires the Court to examine the effectiveness of sanctions other than dismissal. See Poulis, 747 F.2d at 868. Courts often impose monetary sanctions to discourage future discovery abuse. However, monetary sanctions are not an option here because Plaintiff is proceeding in forma pauperis. Additionally, the Court previously awarded Defendant City $ 200 in expenses and attorney's fees based on Plaintiff's violation of Rule 11 and this did nothing to curb Plaintiff's harassment of Defendants' counsels. See Docket No. 44.

Rule 37 suggests other possible sanctions, but each of these lesser sanctions either is tantamount to dismissal or would not be effective. For example, the rule permits the Court to issue an order establishing designated facts in accordance with Defendants' claim. See Fed. R. Civ. P. 37(b)(2)(A). However, due to the lack of discovery, it is unclear to Defendants and the Court what facts could be established against Plaintiff short of ones dictating a dismissal. Rule 37 also permits the Court to issue an order striking parts of the pleadings, preventing Plaintiff from supporting or opposing designated claims or defenses, or prohibiting Plaintiff from introducing certain matters in evidence. See Fed. R. Civ. P. 37(b)(2)(B),(C). However, an order striking out portions of the pleadings or preventing Plaintiff from supporting his claim would be tantamount to dismissal of Plaintiff's claim.

Plaintiff's complaint appears only to allege a violation of his civil rights under 42 U.S.C. § 1983; therefore, the Court would have to strike the pleading in its entirety. Plaintiff's refusal to attend his own deposition has prevented Defendants from raising specific defenses. Finally, the Court could issue an order staying further proceedings until Plaintiff appears at his deposition. See Fed. R. Civ. P. 37(b)(2)(C). Such an order is more likely to harm Defendants by forcing them to spend time and money toward attempting to depose Plaintiff for a sixth time. Additionally, there is no indication from Plaintiff that he would abide by the Court's order and attend the deposition. Therefore, the Court finds that dismissal is the only appropriate sanction at this time.

F. Meritoriousness of Plaintiff's Claim

Finally, under the last **Poulis** factor, the Court must look at the meritoriousness of Plaintiff's claim. See **Poulis**, 747 F.2d at 868. The analysis under this prong is identical to that the Court would apply when ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. When considering a 12(b)(6) motion, the Court must accept as true all facts alleged in the complaint and any reasonable inferences that can be drawn from them. See, e.g., H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989); see also Doe v. Delie, 257 F.3d 309, 313 (3d Cir. 2001). Claims by pro se litigants may be dismissed only "if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." McDowell v. Delaware State Police, 88 F.3d 188, 189 (3d Cir. 1996) (quoting Haines v. Kerner, 404 U.S. 519, 520, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972)).

Furthermore, when a complaint if filed pro se, a court must "apply the applicable law, irrespective of whether a pro se litigant has mentioned it by name." Holley v. Dep't of Veteran Affairs, 165 F.3d 244, 247-48 (3d Cir. 1999).

To establish a claim under 42 U.S.C. § 1983, a plaintiff must "demonstrate a violation of a right secured by the Constitution and the laws of the United States [and] that the alleged deprivation was committed by a person acting under color of state law." Mark v. Borough of Hatboro, 51 F.3d 1137, 1141 (3d Cir. 1995); see Adickes v. S.H. Kress & Co., 398 U.S. 144, 150, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). Although Plaintiff's complaint does not cite § 1983, it does allege that the "Philadelphia Police violated my civil rights." Compl. at 1. Plaintiff's complaint also states that the "Philadelphia Police inflicted severe, permanent injuries to my lumbar herniated disk, neck, knees, and right elbow." Id. The Philadelphia police are persons acting "under color of state law." In liberally construing Plaintiff's pleading, the Court finds that the complaint states a § 1983 claim against Defendant City.

Defendant Bank is not a state actor, so Plaintiff must plead a civil conspiracy to state a proper § 1983 claim against Defendant Bank. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 150, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). To prove a civil conspiracy under § 1983, a plaintiff must establish (1) the existence of a conspiracy and (2) a deprivation of civil rights in furtherance of the conspiracy by a party to the conspiracy. See id. A civil conspiracy is a "combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,'

and 'an overt act that results in damage.'" Adams v. Teamsters Local 115, 2003 U.S. Dist. LEXIS 15477, 2003 WL 22005708, *6 (E.D. Pa. Aug. 6, 2003) (quoting Hampton v. Hanrahan, 600 F.2d 600, 620-21 (7th Cir. 1979), rev'd in part on other grounds, 446 U.S. 754, 64 L. Ed. 2d 670, 100 S. Ct. 1987 (1980)). Plaintiff can prove such an agreement through either direct or circumstantial evidence. See id. Here, Plaintiff's complaint states that "Sun Bancorp Inc. forwarded libel and defamatory information to both, the Philadelphia Police and the F.B.I. As a result, the Philadelphia Police inflicted severe, permanent injuries to [Plaintiff]." Compl. at 1. This is sufficient to state a claim of civil conspiracy against Defendant Bank. Therefore, this factor weighs against dismissal.

IV. CONCLUSION

As mentioned above, the Court need not find all **Poulis** factors weigh in favor of dismissal. No single **Poulis** factor decides the matter. A careful review of all six factors indicates that the Court must dismiss Plaintiff's claim with prejudice. Plaintiff's failure to attend five scheduled depositions is inexcusable. Furthermore, Plaintiff has abused the discovery process by filing countless motions to compel while providing nothing in return. Finally, his inappropriate remarks regarding Defendants' counsels reveal his bad faith in this proceeding. Although the Court concludes that the claim would withstand a motion to dismiss, the first five **Poulis** factors weigh heavily in favor of dismissal. For the reasons stated above, Defendants' motion is granted and Plaintiff's claim is dismissed with prejudice.

An appropriate Order follows.

ORDER

AND NOW, this 26th day of January, 2005, upon consideration of Defendants' Motion to Dismiss Plaintiff's Action Pursuant to Rule 37(b) and Rule 37(d) of the Federal Rules of Civil Procedure (Docket No. 108), Plaintiff's response thereto (Docket No. 110), and Defendants' reply thereto (Docket Nos. 112 & 113), IT IS HEREBY ORDERED that Defendants' motion is **GRANTED.**

BY THE COURT:

S/ HERBERT J. HUTTON, S.J.

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No. 05-462

Supreme Court, U.S.
FILED
NOV 9 - 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

HECTOR L. HUERTAS,

Petitioner,

v.

CITY OF PHILADELPHIA, PENNSYLVANIA; SUN BANCORP., INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Question 1.

Whether, pursuant to Federal Rule of Civil Procedure Rule 37(b), the dismissal of an action after application and balancing of the factors established in *Poulis v. State Farm Fire and Casualty Company*, 747 F.2d 863 (3d Cir. 1984), is a violation of the Due Process Clause of the Fifth Amendment.

Question 2.

Whether, pursuant to Federal Rule of Civil Procedure Rule 37(b), a dismissal of a claim for failure to comply with a discovery order, a showing of "willfulness, bad faith, or any fault of petitioner," as stated in *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), must be evidenced.

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Respondent, Sun Bancorp., Inc. states that it is a privately held corporation. None of its shares are held by a publicly traded company.

1) Respondent, Sun Bancorp., Inc. has no parent corporation.

2) Sun Bancorp., Inc. has no publicly held company that holds 10% or more of the Respondent's stock.

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JURISDICTION

Petitioner timely petitioned for a writ of certiorari pursuant to 28 U.S.C. §2101(c) and that this Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

COUNTER-STATEMENT OF THE CASE

The Court of Appeals for the Third Circuit and the U.S. District Court for the Eastern District of Pennsylvania appropriately applied the balancing factors established in *Poulis v. State Farm Fire and Casualty Company*, 747 F.2d 863 (3d Cir. 1984), including an analysis of "wilfulness and bad faith," in determining that Petitioner's cause of action should be dismissed pursuant to Federal Rule of Civil Procedure Rule 37(b). [Petitioner's Appendix at 1-22]. There was no abuse of discretion and this analysis did not violate Petitioner's Fifth Amendment rights of Due Process and was a valid application of this Court's holding established in *Societe Internationale v. Rogers*, 357 U.S. 197 (1958).

CLARIFICATION OF THE RECORD

Pursuant to Sup. Ct. R. 15, Respondent wishes to clarify what appear to be several misstatements made by Petitioner.

The District Court for the Eastern District of Pennsylvania dismissed Petitioner's claim pursuant to Rule 37(b) of the Federal Rules of Civil Procedure. Upon appeal to the Third Circuit, the Third Circuit upheld the District Court's ruling, stating that "[t]he District Court did not

abuse its discretion in dismissing the complaint. Accordingly, we will affirm." [Petitioner's Appendix at 7].

Contrary to Petitioner's statement of the case, and as the above-cited quote of the record indicates, the District Court's decision was not "overruled" by the Third Circuit. Further, Petitioner's statement that "the Third Circuit Court of Appeals has eliminated 'willfulness or flagrant bad faith' as a condition in its decisions to affirm the District Court's dismissal" was equally incorrect and was not supported by the record. [Petitioner's Appendix at 6-7].

Additionally, Petitioner indicated that " . . . a motion to Dismiss pursuant to Rule 37 was filed by Sun Bancorp., Inc. and jointly on behalf of the City of Philadelphia the day after the scheduled deposition of November 4, 2004, *which the Petitioner attended.*" (emphasis added). That, in fact, was not the case, as the District Court properly identified in its Opinion. [Petitioner's Appendix at 17].

Moreover, Petitioner's assertion that "the district court took judicial notice of Petitioner Hector L. Huertas' military service-connected fear of heights, which *prevented* him from attending the four prior depositions" (italic in original) was an incorrect statement of fact. There is no record of the District Court taking judicial notice or indicating that Petitioner's fear of heights prevented him from appearing at the four previously scheduled depositions. While the District Court did take into consideration Petitioner's fear of heights with regard to the scheduling of the final deposition, there is no record that the District Court deemed such an affliction as the cause of Petitioner's failure to appear for his four previously scheduled depositions.

REASONS FOR DENYING PETITIONER'S WRIT

Pursuant to Sup. Ct. R. 10, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Such compelling reasons include, but are not limited to, issues of federal question, differing decisions of varying United States courts of appeal on the same matter, and United States courts of appeal departing from the accepted and usual course of judicial proceedings. Petitioner Hector L. Huertas has failed to present any compelling reason or evidence any conflict for this Court to exercise judicial discretion over the dismissal of his claim.

A. No Conflict of Law

According to the holding in *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), before a complaint can be dismissed pursuant to Rule 37(b) of the Federal Rules of Civil Procedure, it must be shown that noncompliance was not due to inability, but to willfulness, bad faith or any fault of petitioner. *Id.* at 212. Failure to apply this standard is a violation of a party's Fifth Amendment due process rights. Petitioner asserts that the District Court for the Eastern District of Pennsylvania did not apply this standard and, therefore, Petitioner's due process rights were violated.

Petitioner's claim in the District Court was dismissed based upon the factors established in *Poulis v. State Farm Fire and Casualty Company*, 747 F.2d 863 (3d Cir. 1984). These factors are: (1) The extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to

discovery; (3) a history of dilatoriness; (4) *whether the conduct of the party or the attorney was willful or in bad faith*; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense. (emphasis added). *Id.* at 868. However, the *Poulis* test is not a 'mechanical calculation' for deciding whether to dismiss a Plaintiff's complaint. *See*, *Mindek v. Rigatti*, 964 F.2d 1369, 1373 (3d Cir. 1992). Also, it is not necessary that all of the *Poulis* factors are satisfied to justify dismissal of the claim. *Id.* Deciding whether to dismiss the action under *Poulis* requires a balancing of the factors in the "context of the district court's extended contact with the litigant." *Id.* Petitioner alleges that the District Court does not apply a willful or bad faith standard and, therefore, it conflicts with other appellate court standards which do utilize a willful or bad faith standard. This allegation is in obvious error, as the standard expressly states that willfulness and bad faith are factors to be analyzed. Therefore, his Fifth Amendment due process rights have not been violated and there is no conflict with other appellate courts.

B. No Error or Abuse of Discretion

The Honorable Herbert Hutton, in rendering his Opinion and Order in the District Court, reviewed and articulated the history of the present matter. He indicated that Petitioner was properly noticed for his deposition to take place on May 12, 2003. Petitioner never responded to the notice, never filed a motion for a protective order with the Court and failed to appear at the scheduled time. Petitioner was again noticed for his deposition to take place on May 27, 2003. Petitioner never responded to the notice, never filed a motion for a protective order with the

Court and failed to appear at the scheduled time. Petitioner was again noticed for his deposition to take place on June 17, 2003. Petitioner never responded to the notice, never filed a motion for a protective order with the Court and failed to appear at the scheduled time. In July of 2004, both Defendants scheduled separate depositions for Petitioner. These were later combined into one deposition scheduled for July 22, 2004. Petitioner notified Defendants of his objections to the deposition. Defendants rejected these objections and notified Petitioner that the deposition would continue as scheduled. Petitioner failed to appear and failed to file a motion for a protective order. On August 2, 2004, Defendants filed a motion to compel Petitioner's appearance at his deposition. In an Order dated October 5, 2004, the District Court granted Defendant's motion and ordered Petitioner to appear at a deposition within thirty days. The District Court considered Plaintiff's fear of heights and instructed that the deposition take place no higher than the second floor of a building. Defendants scheduled Petitioner's deposition for November 4, 2004 at 9:30 a.m. on the first floor. Petitioner objected to the deposition because the notice did not state the name of the court reporter and requested a later time for the deposition. Defendants rejected this request and notified Petitioner that the deposition would take place as scheduled. Petitioner failed to appear at the scheduled time, in direct violation of the District Court's order. [Petitioner's Appendix at 10-11].

In rendering its decision dismissing Petitioner's complaint, the District Court analyzed each of the six *Poulis* factors individually and in detail, as required under *In Quality Prefabrication, Inc. v. Daniel J. Keating Co.*, 675 F.2d 77, 81 (3d Cir. 1982) (holding dismissal must be

accompanied by some articulation on record of court's resolution of factual, legal and discretionary issues presented). In particular, and with regard to Petitioner's willfulness and bad faith, Judge Hutton expressed the following:

> . . . Plaintiff has failed to appear for five properly noticed depositions, including the final one for which this Court ordered him to appear. Plaintiff never responded to the first three deposition notices, and filed baseless objections to the final two. Plaintiff requested a protective order for the final deposition, which this Court granted in part and denied in part. Plaintiff was well aware of his obligation to attend his deposition, yet failed to do so. Additionally, while failing to appear for these five depositions, Plaintiff filed several motions to compel against Defendants. Most of these motions were unfounded, as Plaintiff had not made his discovery requests in compliance with the Federal Rules of Civil Procedure. (citation omitted). In an Order denying one of Plaintiff's motions to compel, the Court cautioned Plaintiff that his behavior was "wholly inconsistent with the Federal Rules." (citation omitted).
>
> Plaintiff's behavior deeply troubles the Court. As demonstrated in his numerous filings with the Court, many of Plaintiff's motions contain countless irrelevant and disparaging remarks directed at Defendants' counsels. This behavior further reveals Plaintiff's bad faith and willfulness throughout the two years of discovery and again weighs heavily in favor of dismissal.

[Petitioner's Appendix at 17-18].

We see from this excerpt that the record was devoid of any justification for Petitioner's failure to appear at his first four depositions. Further, Petitioner failed to justify his failure to appear for his final court-ordered deposition, even after the District Court partially granted Petitioner's protective order and directed Defendants to conduct the deposition on the first floor for Petitioner's convenience. Such failure to appear was in direct violation of that Court's order. Morever, Petitioner's bad faith is also evidenced by the District Court through its examination of Petitioner's excessive and often frivolous motion practice, his failure to comply with Federal Rules even after being warned by the Court, and his irrelevant and disparaging remarks toward Defendant's counsels. Based upon all the foregoing, the Honorable Judge Hutton found that Petitioner's actions were willful and in bad faith. That analysis, along with the analysis and weighing of the remaining five *Poulis* factors, brought the District Court to the determination that dismissal of Petitioner's complaint was warranted.

Upon appeal, the Third Circuit upheld the District Court's ruling. In doing so, they reviewed the record created by the District Court and specifically addressed the issue of willfulness and bad faith:

> With respect to bad faith or willfulness, Huertas argues that his fear of heights and back injury prevented him from attending his depositions, and that his lack of attendance was not designed to prevent the defense from taking his deposition. It is not so clear that Huertas' conduct was willful as defined by this court. (citation omitted).

[Petitioner's Appendix at 6].